

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
United States Department of Justice, Federal)	RM-10865
Bureau of Investigation and Drug)	
Enforcement Administration)	
)	
Joint Petition for Rulemaking to Resolve)	
Various Outstanding Issues Concerning the)	
Implementation of the Communications)	
Assistance for Law Enforcement Act)	
)	

**REPLY COMMENTS OF
SOUTHERN LINC,
SOUTHERN TELECOM, INC., AND
SOUTHERN COMPANY SERVICES, INC.**

Southern Communications Services, Inc. d/b/a Southern LINC, Southern Telecom, Inc., and Southern Company Services, Inc. (collectively “Southern”) hereby submit their Reply Comments in response to the Commission’s Public Notice¹ regarding the Joint Petition for Expedited Rulemaking (the “Petition”) filed on March 10, 2004, by the U.S. Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (“Petitioners”). Southern recognizes and supports the importance of assisting law enforcement in the conduct of lawful electronic surveillance to investigate and prevent crime and potential terrorist activities. However, Southern is concerned that the specific requests set forth in the

¹ / Public Notice, *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA No. 04-700, released March 12, 2004.

Petition raise significant legal and factual issues that can only be properly addressed through full Notice and Comment rulemaking. Southern therefore opposes the Petition and urges the Commission to consider the Petitioner's requests only in the context of a formal rulemaking proceeding.

I. INTRODUCTION

Southern LINC, Southern Telecom, Inc., and Southern Company Services, Inc. are wholly-owned subsidiaries of Southern Company, which is a registered holding company under the Public Utility Holding Company Act of 1935, as amended. Southern Company, through five electric utility subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company, provides retail and wholesale electric service throughout a 120,000 square mile service territory in Georgia, most of Alabama, and parts of Florida and Mississippi. Southern LINC provides Commercial Mobile Radio Service ("CMRS") to business, government, and consumer subscribers, as well as serving Southern Company's operating utility companies. Southern Telecom, Inc. provides long-haul and metropolitan dark fiber and other infrastructure assets in support of competitive telecommunications services. Southern Company Services, Inc. provides administrative and other functions, including internal telecommunications services, in support of Southern Company and its operating companies.

Southern is also active in the development of Broadband over Power Line ("BPL") technology and systems. Although this is still a developing technology, it is already showing promise as a future platform for the delivery of broadband communications services. Southern is a member of the United Power Line Council ("UPLC"), an industry organization dedicated to the development of BPL in the United States. Southern generally agrees with and supports the

positions set forth by the UPLC in their comments filed in this proceeding on April 12, 2004, opposing the Petition.

II. BROADBAND ACCESS AND BROADBAND TELEPHONY SERVICES CANNOT BE MADE SUBJECT TO CALEA PURSUANT TO A DECLARATORY RULING

Petitioners have requested that the Commission issue a ruling declaring that broadband access and broadband telephony services are subject to CALEA. The Commission should reject this request. As discussed below, the appropriate classification of broadband access and broadband telephony services, whether under CALEA or under the Communications Act, implicates a host of legal, factual, and policy issues that require the development of a record far more complete than exists at this time. This question is far too complex to be resolved through a declaratory ruling and requires, at a minimum, that the Commission conduct a full Notice and Comment rulemaking proceeding before reaching any conclusions.

Petitioners assert that providers of broadband access and broadband telephony services are “telecommunications carriers” as defined in Section 102(8) of CALEA, since their service includes the “transmission or switching of . . . electronic communications.” Petitioners further assert that such service providers also meet what Petitioners refer to as CALEA’s “alternate” definition in Section 102(8)(B), since their services are “a replacement for a substantial portion of the local telephone exchange network.” Although CALEA’s definition of a “telecommunications carrier” expressly excludes providers of information services from its coverage, Petitioners assert that the “information services” exception is to be interpreted narrowly and that Congress “did not intend” for this exception to apply to Internet access or electronic voice services.

However, the issues as set forth by Petitioners are not so cut-and-dried. Many commenters in this proceeding challenge Petitioners' analysis, citing both the legislative history of CALEA and the plain language of the statute itself to argue that Congress intended the scope of CALEA to be interpreted and applied on a very narrow basis, contrary to the assertions contained in the Petition.² Many commenters have also presented strong evidence – including the legislative history of CALEA, the definition in CALEA of “information services,” and Commission precedent – that CALEA’s “information services” exception should be interpreted much more broadly than Petitioners assert.³

Although the CALEA definition of “telecommunications carrier” does not rely on the interpretation of that term under the Communications Act, many commenters argue that the definitions of “information services” under both CALEA and the Communications Act are virtually identical and cannot, as a legal or practical matter, be interpreted or applied independently of each other.⁴ As the Commission is well aware, it is far from settled whether broadband access services (such as cable modem) or broadband telephony services (such as Vonage’s VoIP service) are properly classified as information services under the Communications Act. Until these issues are resolved, the Commission cannot in this proceeding “declare” that they are *not* information services for purposes of CALEA.

Petitioners’ assertion that providers of broadband access and broadband telephony services nevertheless satisfy CALEA’s “alternate” definition of “telecommunications carriers” –

² / See, e.g., Comments of BellSouth Corp.; Comments of the Cellular Telecommunications & Internet Association (“CTIA”); Comments of the ISP CALEA Coalition; Comments of the Telecommunications Industry Association (“TIA”).

³ / See, e.g., Comments of CTIA, pp. 9-15.

⁴ / See Comments of the ISP CALEA Coalition, p. 16 (“In the *CALEA Second Report and Order*, the Commission stated that it ‘expect[s] in virtually all cases that the definition of the two Acts will produce the same results’.”) (internal citation omitted).

i.e., as a “substantial replacement” for local telephone exchange service – suffers from an almost non-existent factual record. This is a determination that cannot be made in a factual vacuum. The necessary data and evidence for determining whether a service substantially replaces the local telephone exchange service can only be gathered in the context of a full Notice and Comment rulemaking proceeding.

A full Notice and Comment rulemaking would also allow the Commission to more fully consider the ramifications of any decision it makes on CALEA as applied to broadband access and broadband telephony services. In passing CALEA, Congress emphasized that it should not “imped[e] the development of new communications services and technologies.”⁵ One example of such a new technology is broadband over power lines, which was singled out by President Bush as an example of the new broadband technologies that he is seeking to promote as part of the Administration’s new policy initiative.⁶ The Commission must therefore conduct the kind of analysis that can only be performed properly within the context of a rulemaking in order to ensure that it does not apply CALEA requirements in such a way as to impede the development of new BPL technologies.

In addition, any determination the Commission makes with respect to broadband access and broadband telephony services will necessarily call into question the applicability of CALEA to other information services. For example, what would differentiate a covered broadband telephony service from a data service that might include a voice component? What differences, if any, would (or should) there be in the specific CALEA obligations that would apply to specific

⁵ / H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N., 3489, 3493 (1994) (“House Report”).

⁶ / “A New Generation of American Innovation”, April 2004, http://www.whitehouse.gov/infocus/technology/economic_policy200404/toc.html (last visited April 27, 2004).

types of services or service providers? The Commission is already wrestling with exactly these sorts of definitional conundrums in its current rulemaking proceeding on IP-enabled services. A full rulemaking proceeding is the only way to ensure that such definitional issues are properly addressed.

III. CONCLUSION

It is clear that the various legal, factual, and policy issues implicated by subjecting broadband access and broadband telephony services to CALEA obligations are far too complex to be resolved through the simple expediency of a declaratory ruling. Although Southern takes no position at this time as to the appropriate classification of broadband access and broadband telephony services under CALEA or under the Communications Act, Southern is concerned that this issue cannot be resolved without a full and substantially more complete record, thus making a declaratory ruling inappropriate.

For the foregoing reasons, Southern urges the Commission to deny Petitioners' request for a declaratory ruling that broadband access services and broadband telephony services are subject to CALEA and to instead submit this issue to a formal Notice and Comment rulemaking proceeding.

Respectfully submitted,

**SOUTHERN LINC, SOUTHERN
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